IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.P.BALACHANDRAN

MONDAY, THE 5TH FEBRUARY 2007 / 16TH MAGHA 1928

CRL.A.No. 1409 of 2004

SC.45/1999 of ADDITIONAL SESSIONS COURT (ADHOC)-II, KOLLAM
CP.52/1998 of JUDL.MAGISTRATE OF FIRST CLASS-I, KOLLAM

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APPELLANT/ACCUSED:

ANILKUMAR, S/O. SEBASTIAN,
YESUVILASAM PUTHEN VEEDU,
MULAVANA CHERRY,
MULAVANA VILLAGE.

BY ADV. SRI.C.RAJENDRAN

RESPONDENT/COMPLAINANT:

STATE OF KERALA, REPRESENTED BY THE
CIRCLE INSPECTOR, KUNDARA POLICE STATION
THROUGH THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SRI.THOMAS JOHN AMBOOKAN

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 05/02/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.P. Balachandran, J.

Crl.A.No. 1409 of 2004

JUDGMENT

The accused, convicted by the Additional Sessions Court (Adhoc)-II, Kollam for offence under Section 55(a) of the Abakri Act (hereinafter referred to as 'the Act') and sentenced thereunder to undergo rigorous imprisonment for a term of four years and to pay a fine of Rupees one lakh and in default to undergo simple imprisonment for a further term of one year, is the appellant.

2. The prosecution case is that at about 5.30 p.m. on 10.5.1998, the appellant was found in possession of about two litres of arrack in a five litre can for sale at Mulavava Village in Mulavana Cherry near Madankavu within the property, wherein Yesuvilasom Puthenveedu is housed and thereby he committed offences punishable under Sections 55(a) and (i) of the Act.

3. When PW4, the S.I. of Kundara Police Station was conducting patrol duty, accompanied by PW3 and CW4, he got reliable information regarding possession by the appellant of arrack for sale. He reached the place at about 5.30 p.m. The appellant thereupon attempted to take to heels and he was apprehended by PW4 and party. PW4 got convinced by smell and taste that the contents in the can held by the appellant was arrack. He effected arrest of the appellant, collected sample in a 375 ml bottle and the sample as well as the residue were all sealed in the presence of the witnesses, affixing necessary paper slips signed by the witnesses. He registered Crime No.251/98 of his police station under Sections 55(a) and (i) of the Act against the appellant. He produced the material objects and the accused before court. He conducted investigation in the case. On completion of the investigation, he submitted final report, chargesheeting the appellant for offences under Sections 55(a) and (i)

of the Act.

4. The Judicial First Class Magistrate-I, Kollam, before whom the final report was so laid, after complying with all legal formalities, committed the case to the Sessions Division, Kollam, vide Committal Proceedings No.52/98. The case was registered in the Sessions Division as S.C.No.45/99. The Addl. Sessions Judge, after hearing the prosecution and the defence, framed charge against the appellant for offences under Sections 55(a) and (i) of the Act, read it over and explained it to the appellant and questioned him. Thereupon, he pleaded not guilty. Consequently, a trial of the case was conducted.

5. Prosecution examined PWs 1 to 5, got marked Exhibits P1 to P4 and got identified MO1. On the prosecution closing their evidence, the appellant was questioned under Section 313 Cr.P.C. Thereupon, he generally denied all incriminating circumstances appearing in evidence against him and

maintained that he is innocent. On the defence side DW1 was examined.

6. According to the appellant, he was residing in a rented building at Nanthirikkal. On 10.5.1998, a Police Constable named Viswanathan (CW4) informed him to report before the newly appointed Sub Inspector. He was detained in the police station on the ground that he is an accused in a crime. His case is that Police Constable Viswanathan (CW4) told him that he would be released if the Sub Inspector is bribed, but, he was not prepared for that and that is why he has been implicated in this case. The court below found the appellant not guilty of the offence under Section 55(i) of the Act, but found him guilty of the offence under Section 55(a) of the Act, convicted him thereunder and sentenced him as already stated. Hence, this appeal assailing the conviction and sentence under Section 55(a) of the Act.

7. PWs 1 and 2 are independent witnesses and they have turned hostile to the prosecution and they have even denied of their having affixed their signatures in the seizure mahazar. There is only the evidence of PWs 3 and 4 in support of the prosecution case, as PW5 is only the officer, who has verified the records and submitted the charge.

8. PW4 is the S.I. of Kundara Police Station, who is the Detecting Officer in the case. He has given evidence as regards the information received by him regarding the storing of arrack for sale by the appellant. He has stated that pursuant to the information when he reached in front of the appellant's house, the appellant was found taking to heels from the veranda of his house, taking a blue plastic can with him. He was intercepted and the contents in the can was examined and he was convinced by the smell and taste that the contents is arrack. Pursuant thereto, he effected arrest of the accused, took sample from the said arrack and

took into bandavast duly sealed and packed both the sample as also the residue of arrack in the can. Mahazar prepared in that behalf is Exhibit P1. MO1 is the can, which contained the residue of arrack. The FIR drawn, registering the case as Crime No. 251/98 is Exhibit P2. He has deposed that CW4 Viswanathan, who also was accompanying him in the detection and seizure, is no more. He has produced the material object describing it in Exhibit P3 property list on 19.5.1998 and Exhibit P4 is the report of chemical analysis obtained in relation to the sample forwarded for examination. PW4 has asserted that he was effecting the arrest of the appellant from his residential compound just behind his residence. PW4 has deposed that though he prepared a search memo, he had no occasion to effect search within the house, as the appellant had moved out with the arrack kept in the can. The evidence given by PW4 stands corroborated by the testimony of PW3, the Police Constable, who

accompanied PW4 along with PC 4088 Viswanathan, who is stated to be now no more. He has also deposed consistent with the testimony of PW4.

9. The learned counsel for the appellant did not pursue his argument that the search was illegal, as the evidence of both PW3 and PW4 show that no search was conducted within the residence of the appellant. It is contended by the learned counsel for the appellant that the material object seized was produced before court only on 19.5.1998, though the seizure was effected as early as on 10.5.1998 and that the delay in production of the material object was for the reason that no seizure of arrack was effected from the possession of the appellant and the production was belated only on account of the delay on the part of PW4 to procure the arrack. Such an argument is advanced on the basis of a suggestion put to PW4. But, no such suggestion was made to PW3, who was also accompanying PW4 in the detection and seizure. The

argument advanced on behalf of the appellant is that there is no independent witness to the detection and seizure and that, therefore, solely on the basis of the evidence given by the police officials conviction of the appellant is not proper.

10. I am not prepared to agree with the argument so advanced. If the argument is upheld, it has to be held that no search and seizure effected by empowered officials can be believed and acted upon in case the accused is able to win over the independent witnesses. In the instant case, the accused has no case that PW3 or PW4 is having any animosity towards him or that they had any axe to grind by implicating him in this grave crime.

11. It is further contended by the learned counsel for the appellant, on the basis of the testimony of DW1, examined on the side of the defence, that the appellant was not residing in the house stated by the prosecution and that he was

residing in House No.IV/496, belonging to the wife of DW1, which was rented out to the appellant for a period of one year from 1.1.1998 on a monthly rental of Rupees five hundred, as his family was shifting to their new house. If that be so, the building might have been let out as early as in January 1997 for a period of one year, as the letting was consequent on their shifting to the new house in January 1997, as stated by DW1. There is absolutely no record to establish that the appellant was residing in the house allegedly let out to him by DW1, apart from the testimony of DW1 himself.

12. To the specific question by the prosecutor in cross-examination, DW1 has stated that the appellant is residing in Yesuvilasom Puthenveedu. In fact, that is the prosecution case and it is from that house that the appellant was found by PW4 and party, taking to heels. Thus, the defence contention that the appellant was not residing in

the house from where the prosecution alleges that he was found taking to heels with arrack stored in a can cannot be correct and is not tenable. The connection of the appellant for offence under Section 55(a) of the Act is, hence, correct and sustainable.

13. Finally, it is contended before me by the learned counsel for the appellant that the sentence awarded by the court below is excessive considering the nature and circumstances of the case and the background of the appellant. He submits that there is no evidence as regards prior conviction and that he is an youngster having his wife and a child as also his mother and that considering the entire circumstances, the appellant may not be subjected to imprisonment for such a long period, as to deprive of an opportunity to him to get reformed. Considering the entire aspects of the case, I am of the view that the sentence of imprisonment awarded by the trial court is excessive.

14. In the result, while confirming the conviction of the appellant for offence under Section 55(a) of the Act, I modify and reduce the substantive term of imprisonment awarded to the appellant by the court below from four years to one year. The sentence imposing fine is maintained as such. But, the sentence in default of payment of fine is modified and reduced to simple imprisonment for six months.

This appeal is disposed of as above.

5th February, 2007 (K.P.Balachandran, Judge)

tkv